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IN THE

Supreme Court of the United States

No. 305

In the Matter

of

SLEEP PRODUCTS, INC.,

Bankrupt.

LOCAL 140 SECURITY FUND,

Petitioner,

WILLIAM S. HACK, Trustee.

BRIEF OF CLAIMANT CITY OF NEW YORK IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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The question involved is whether a claim by a union welfare fund, based upon provisions of a collective bargaining agreement requiring the employer (without making any deduction from the wages of its employees) to make monthly payments to the fund based on a fixed percentage of the gross monthly payroll of the employees in the bargaining unit, is a claim entitled to a priority as "wages" under §64a(2) of the Bankruptcy Law [11 U.S.C. 104(a)(2)].

This question must be considered in light of the fact that the employees have no option to receive any part

of the payments to the fund and have no right, title or interest in the fund except rights which accrue under an insurance policy or other welfare benefits which rights may not be assigned, and the insurance is only available so long as an employee is working for an employer covered by a collective bargaining agreement with a specified union while the other benefits apply only when an employee has worked for employers covered by such an agreement for a fixed number of years prior to retirement.

Facts

1

The petitioner, Local 140 Security Fund (hereinafter referred to as "the Fund"), was organized pursuant to an agreement and declaration of trust for the purpose of financing various types of social insurance for employees in the bedding industry (App. 11a). These include, but are not limited to, life insurance, accident and health insurance, insurance for medical care and hospitalization and disability benefit insurance (App. 11a). In addition, the Fund pays over moneys to a separate pension fund for the purpose of financing retirement pensions for employees in the bedding industry (App. 12a).

Collective bargaining agreements entered into between employers and the Bedding, Curtain and Drapery Workers Union, Local 140, provide for payments by the employer to the Fund based upon the gross monthly payroll of employees covered by the agreement (App. 11a). The bankrupt employer here involved entered into such an agreement under which it agreed to make monthly payments to the Fund of "a sum equal to 6% of the monthly gross payroll of the employees in the bargaining unit," plus a

similar additional payment of ½% (App. 45a). This agreement also provided that the social benefits provided by the Fund "will meet the requirements of all applicable laws and will satisfy the Employer's obligation under the New York State Disability Law, without further obligation on the part of the Employer." (App. 45a). As a result of this latter type of provision employers receive an exemption from paying the taxes provided by the New York Disability Benefits Law (Workmen's Compensation Law §211, pars. 4, 5) [App. 12a].

2

The payment of the employer's contribution to the Fund is not subject to the payment of income or withholding taxes by the individual employee (App. 13a). No employee has an option to receive any part of this contribution or payment by the employer in lieu of the insurance or pension benefits (App. 13a). The individual employee does not have any right, title or interest in any part of the trust estate or fund so created, except such rights as may accrue to him under an insurance policy or for other welfare benefits (App. 13a). No employee has the right to assign his insurance, pension or other benefits or to receive a cash consideration in lieu of such benefits, even upon severance of employment (App. 17a, 27a).

The insurance coverage provided by the Fund extends to an employee only while he is working for an employer who is covered by a collective bargaining agreement with Local 140 of the Union (App. 11a). To be eligible for pension benefits an employee must be employed by an employer or employers covered by a collective bargaining agreement with Local 140 "for a specified number of years prior to the date of retirement" (App. 12a).

For some time prior to the filing of the petition in bankruptcy, the bankrupt had been in default in making payments to the Fund (App. 13a). The amount which, under the collective bargaining agreement, the bankrupt was required to but did not pay to the Fund for the three-month period immediately preceding the filing of the petition was $993.75 (App. 13a-14a).

The Fund claimed a priority under Section 64a(2) of the Bankruptcy Act (App. 14a). The City of New York, which had filed a priority claim for excise taxes under Section 64a(4) of the Bankruptcy Act, joined the trustee in a motion to disallow the claim of the Fund as a priority claim (App. 8a-10a).

Referee Loewenthal disallowed and expunged the Fund's claim on a priority basis, but allowed it as a general claim (App. 57a-59a). He wrote an opinion in which he concluded that the payments to the Fund did not constitute "wages" under the Bankruptcy Act since they were not translatable into dollars to the individual wage-earner, gave him no proprietary or assignable interest and were not taxable to him as income (App. 49a-55a).

The District Court for the Southern District of New York affirmed the order of the Referee (App. 74a-75a). Judge Herlands wrote an opinion which constitutes a careful and detailed analysis of the problem. (App. 59a-73a). The Court of Appeals unanimously affirmed.

ARGUMENT

Payments by an employer to a union welfare fund which are not deducted from the wages of employees are not entitled to the wage priority provided by Bankruptcy Act §64a(2).

1

The priority provided by Section 64a(2) applies only to "wages * * * which have been earned * * *, due to workmen," etc. Here the payments required by the collective bargaining agreement to be paid to the union welfare fund are on their face not wages, not earned by the employees and not due to them.

They are not wages in the sense that they are not paid to the employee. Nor may he enforce the employer's liability for such payments. The employee does not have and never did have an assignable interest in such payments (App. 17a, 27a). In addition, the individual employee does not "have any right, title or interest in or to any part of the trust estate or fund" created from such payments except such rights as might accrue to him under an insurance policy or for other welfare benefits (App. 13a).

Even the insurance coverage is limited to the period that the employee is working for an employer who has a collective bargaining agreement with Local 140 (App. 11a). Thus, [illegible]very employees who lose their jobs because of the bankruptcy are ineligible for this insurance coverage unless and until they obtain employment with another employer who has a collective bargaining agreement with Local 140. And an employee is entitled to a pension only after he has worked for an employer covered by such a collective bargaining agreement for a specified number of years prior to the date of retirement (App. 12a).

The payments do not constitute a deduction from the wages of an employee. The employer, under the collective bargaining agreement, agreed to pay to the Fund "a sum equal to" 6½% of the monthly gross income of the employees in the bargaining unit (App. 45a). In part this payment was for the employer's own benefit since it was agreed that the social benefits to be provided by the Fund would "meet the requirements of all applicable laws and will satisfy the Employer's obligations under the New York State Disability Law, without further obligation on the part of the Employer" (App. 45a). Obviously, had the employer been required to make payments under the New York State Disability Law, such payments would not constitute wages of the employees.

The view that the payments do not constitute wages of the individual employees is confirmed by the fact that such payments are not subject to the payment of income or withholding taxes by the employees (App. 13a). Nor are they considered as wages under the Insurance Contributions Act (Social Security Law) [26 U. S. C. 1426 (a)(2)].

The payments are not earned by the individual employee since it is evident that whatever indirect benefit an employee gains from such payments—the limited rights to insurance and a pension—are retained even when he does not work because of illness during a month for which a payment to the fund becomes due.

We have already shown that the payments are not due to the individual employee in our discussion of these payments as wages.

2

In the analogous cases of *Matter of Well Bilt Box Spring Corp. (Bayer)*, 196 Misc. 848 (Sup. Ct., Kings Co., 1949) and *Matter of Hollywood Commissary (Weintraub)*,

195 Misc. 441 (Sup. Ct., Kings Co., 1949), the New York courts held that claims for union welfare funds were not entitled to a wage priority in assignments for benefit of creditors under the analogous provision of law which, at that time, read (Debtor and Creditor Law, §22):

> "In all distribution of assets under all assignments made in pursuance of this article, the wages or salaries actually owing to the employees of the assignor or assignors at the time of the execution of the assignment for services rendered within three months prior to the execution of the assignment, not exceeding three hundred dollars to each employee, shall be preferred before any other debt;"

In the *Hollywood Commissary* case the Court said (195 Misc. at p. 442):

> "This is not a claim for wages although the amount is computed by a percentage of wages. It is not deducted from the employees' wages but is merely a matter of contract between the employer and the union."

Subsequently legislation was enacted which expressly provided a priority for such payments by an employer to a welfare fund (L. 1952, ch. 794, §1). The Bankruptcy Act, however, has not been so amended. Nor can the State law be applied in construing the meaning of "wages" under the Bankruptcy Act. *Lane* v. *Industrial Com'r of State of New York*, 54 F. 2d 338 (C. C. A., 2nd Circ., 1931); *In re Raiken*, 33 F. Supp. 88, 89 (D. Ct., N. J., 1940). See, also, *In re Slomka*, 122 Fed. 630 (C. C. A., 2nd Circ., 1903).

3

The petitioner attempts to establish payments to it as "wages" by a semantic device. It discusses so-called fringe benefits under collective bargaining agreements. It

then points to certain fringe benefits, such as vacation pay and severance pay, which were held to constitute wages. It concludes that, since payments to a union welfare fund are also fringe benefits, such payments constitute "wages." With regard to this type of reasoning it should suffice to point out that the question at issue is the meaning of "wages" as used in the section of the Bankruptcy Act and not the meaning of "fringe benefits." With respect to the cases relied on there is a clear point of distinction in that they involved payments which the workmen were entitled to receive as an element of compensation for their labor. They were not payments to others in a manner which gave the workmen no rights except indirect and contingent ones to be received from the fund, not the employer.

The fact that these payments are not "wages" is best brought out by an example of a situation which is likely to arise if they are so held. Suppose an employee of a bankrupt employer is owed $600 in direct wages earned within three months before the date of the commencement of the proceeding and the employer also owes payments to a union welfare fund for the same period. Since the priority granted is for "wages not to exceed $600 to each claimant," the priority could not be applied to the payment due the welfare fund without reducing the amount to be paid to the employee. Even if the $600 were allocated between the employee and the fund, the amount received by the employee would be reduced. It seems evident that, in light of the obvious reasons for giving the wage priority, it was never intended to reduce the payment to the employee in return for an indirect and contingent benefit which he might receive in the future from a welfare fund. Yet, if the payments to such a fund are "wages", there would appear to be no sound ground for subordinating them to other "wages."

4

The cases under the National Labor Relations Act relied upon by the petitioner relate to an altogether different type of statute which must be interpreted in view of its purposes which are far different from those of the Bankruptcy Act. Moreover, the word "wages" in that statute must be interpreted in light of its context: it is part of the phrase "rates of pay, wages, hours of employment, or other conditions of employment" (National Labor Relations Act, §9a; 29 U. S. C. §159a).

The petitioner also relies upon the superficial resemblance between the case at bar and the case of *United States* v. *Carter*, 353 U. S. 210 (1957). That case, however, involved a substantially different statute. The question in issue was the extent of the liability of a surety on a payment bond required by the Miller Act.

As this Court pointed out (353 U. S. at p. 217):

> "The Act, however, does not limit recovery on the statutory bond to 'wages'."

The Miller Act is aimed at insuring the payment in full of all obligations arising for "labor or material" in the prosecution of work under the contracts covered by it. The breadth of its applicability is shown by *Standard Insurance Co.* v. *United States*, 302 U. S. 442 (1938), in which a similar predecessor statute was held applicable to a railroad's claim for unpaid freight due for the transportation of construction materials. The Miller Act applies regardless of the amount of the claim for labor and without limitation on the period in which it was earned.

The broad scope of the Miller Act must be contrasted with the narrow confines of the Bankruptcy Act priority provision which is limited: (1) to "wages" earned by

workmen, servants, clerks and salesmen; (2) to no more than $600 for each wage claimant; and (3) to wages earned within three months before the commencement of the bankruptcy proceeding.

Finally, it should be noted that the welfare fund involved in the *Carter* case paid insurance benefits to any employee who worked for at least 400 hours in a six-month period during the following six months even if he was no longer employed in the construction industry (210 U. S. at p. 214, fn. 1). The welfare fund in the present case gives no insurance benefits to an employee unless he continued to work for an employer covered by a collective bargaining agreement with Local 140 and eligibility for a pension required working for an employer with such an agreement for a specified number of years.

CONCLUSION

The application for a writ of certiorari should be denied.

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